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No. 83-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,
Petitioner,

v.

ATLANTIC RICHFIELD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

PETITIONER'S REPLY BRIEF

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*Parent companies, subsidiaries and affiliates of Eastern Air Lines, Inc. are listed in Petitioner's Brief at ii.

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

Respondent has sought to justify the result in this case on prejudgment interest on two spurious grounds. First, respondent argues that because ESA § 210 allowed treble damages, although none were awarded, Congress ruled out prejudgment interest in an action under that section. Respondent's Brief in Opposition ("Res. Br.") at 4-5. That argument is inconsistent with all precedent, which holds that when a statute is silent on prejudgment in-

terest, the issue should be determined on the basis of federal common law. Second, Atlantic Richfield argues that, in this particular case, prejudgment interest was not justified due to the alleged uncertainty of the amount due. Res. Br. at 7-9. That argument is unpersuasive, as any uncertainty was caused solely by Atlantic Richfield, which should not be allowed to benefit from its own actions.

ARGUMENT

ATLANTIC RICHFIELD'S BRIEF DEMONSTRATES THE CONFUSION CONCERNING THE AWARD OF PREJUDGMENT INTEREST

A. The Statute Does Not Prohibit The Award Of Interest.

Atlantic Richfield's argument that ESA § 210 prohibits the award of prejudgment interest is specious. Under Atlantic Richfield's reading of the statute, overcharges are an "all or nothing" proposition. A private plaintiff either reaps a bonanza in the form of treble damages, or it receives woefully inadequate compensation by the denial of prejudgment interest. While it is true that prejudgment interest is not awarded where mandatory treble damages or other penalties are awarded under a federal statute, that prohibition should not exclude the award of prejudgment interest where treble damages are discretionary and are not, in fact, awarded. It is the awarding of a penalty in fact, not its existence as a threat, that precludes prejudgment interest. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945) (Res. Br. at 5). In the situation which is present here, the failure to award prejudgment interest provides a windfall to the

errant defendant.[1]

Atlantic Richfield's second argument, that the award of prejudgment interest would be inequitable due to the uncertainty of the amount due, ignores the history of this litigation and Atlantic Richfield's conduct with regard to the governing regulations. All damage calculations were based on the Refiner's Monthly Cost Allocation Reports (RMCAR), filed by Atlantic Richfield with the government. Atlantic Richfield modified and refiled its RMCAR's for 1973 and 1974 on at least four occasions. A. 67-69. The data used at trial were not even available until May 1979, when Atlantic Richfield last refiled its RMCAR's. A. 69.

Prior to that 1979 refiling, Atlantic Richfield refused to be pinned down on the most fundamental of regulatory data, requiring Eastern to contend with a constantly-changing basis for its overcharge calculations. From 1979 on, Eastern's overcharges were ascertainable with mathematical certainty. Once Atlantic Richfield stopped changing its figures, both Atlantic Richfield and Eastern were able to agree on the accuracy of each other's computations; to those, there was no dispute. They were based on data available in 1979, and it was only the district court's use of those data—assuming refunds where none occurred—that created uncertainty. *See* Petition at 13-15. The only question remaining, after Atlantic Richfield decided what its numbers were, was which overcharge

[1] It is undisputed that Atlantic Richfield pocketed some $26.9 million in overcharges between November 1973-October 1974. Under the judgment of the court below, it will keep some $26.7 million; even if Eastern is awarded the damages (before interest) it established under the reporting and regulatory requirements of the energy regulatory agencies, Atlantic Richfield will still keep almost $26 million of the overcharges.

theory would be accepted by the court.[2]

By arguing that prejudgment interest should not be awarded in this case because the amount of the overcharge was "uncertain," Atlantic Richfield seeks to benefit from its own cavalier approach [3] to the regulations. It was Atlantic Richfield, and not Eastern, that continually changed the rules of the game as far as damage calculations were concerned by constantly adjusting its reports to the government. Thus, the uncertainty of the amount that Atlantic Richfield argues as sufficient grounds for TECA's decision on prejudgment interest actually supports an award because it was of Atlantic Richfield's own creation.

Furthermore, Atlantic Richfield's chameleon character did not disappear once the long-awaited "final" FEO-96's were filed in mid-1979. When Eastern filed its motion

[2] Atlantic Richfield's other attempts to shift the causes of uncertainty to Eastern are wide of the mark. *See* Res. Br. at 8 n. 10 and n. 11. With regard to the "class of purchasers" issue, Atlantic Richfield's theory, adopted by the district court, was formulated in late 1981, after Atlantic Richfield changed lawyers, and, in any event, that issue does not affect the damage calculations here involved in any way. With regard to the "purchased other covered products" issue, Atlantic Richfield presented for the first time at trial evidence of its alleged compliance with the applicable regulations, which evidence had no relationship to all previous deposition testimony and exhibits on the subject. The trial court overruled Eastern's motion to strike all such evidence for abuse of the discovery process; when that was denied, Eastern had no choice but to abandon the issue on which it had been led afield by Atlantic Richfield. Atlantic Richfield's recalculation of purchased other covered product data, more than five years after the relevant time frame and after Eastern had had discovery on the issue, evidences the cause of the uncertainty perceived by the district court.

[3] By no means does Eastern agree (as Res. Br. at 4 n.3 seems to imply) with the district court's conclusion that Atlantic Richfield had any sort of effective compliance system in place to avoid overcharges; the weight of the evidence is strongly to the contrary. Eastern simply bowed to the standard of review for bench-tried cases.

for partial summary judgment in 1981, overcharge calculations were submitted that were identical to those submitted at trial on retroactive reallocation. In opposing that claim, Atlantic Richfield never once alleged that the overcharges of $946,108 calculated by Eastern were excessive. It was five months after summary judgment was entered when Atlantic Richfield first sought to challenge Eastern's calculations, further demonstrating that uncertainty of the amount of the overcharge was caused solely by Atlantic Richfield. It would be unjust to allow it to illegally profit by its continued maneuvering.[4]

B. Atlantic Richfield's Argument Supports The Need For Supreme Court Review Of Prejudgment Interest.

Atlantic Richfield proposes multiple grounds in support of the result in this case. By grasping at so many straws, Atlantic Richfield demonstrates glaring need for consistency in the federal common law on prejudgment interest.

Atlantic Richfield first argues that the statute precludes prejudgment interest. Res. Br. at 5-6. However, the statute is, in fact, silent on prejudgment interest, and therefore the issue is a matter of federal common law. *Rodgers v. United States*, 332 U.S. 371, 373 (1947). Atlantic Richfield's argument also assumes a bizarre Congressional intent that contemplated, in the event treble damages are not awarded, that a regulated entity would receive

[4] Moreover, whether the amount of the overcharge was "uncertain" or not should not be controlling. The lack of a theoretical or practical basis for a liquidation requirement as a prerequisite to prejudgment interest was recognized by this Court some fifty years ago in Funkhouser v. J. B. Preston Co., 290 U.S. 163, 169 (1933). *See also* West v. Harris, 573 F.2d 873, 882 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).

the benefit of violating the regulations at the expense of a private plaintiff assuming a role created by Congress to assist in policing the regulations. *See Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (TECA 1980). The statutory result urged by respondent also misconstrues the purpose of prejudgment interest. Interest is not a "penalty" or an "inequitable" levy as Atlantic Richfield portrays it. Res. Br. at 9. It is instead a remedy that serves to make the injured party whole and to prevent the guilty party from benefiting from its wrongdoing. *See Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA), *cert. denied*, 103 S. Ct. 172 (1982).

Secondly, Atlantic Richfield argues that the award of prejudgment interest is discretionary and reviewable only as an "abuse of discretion." Res. Br. at 6. Neither the district court nor TECA viewed the issue in terms of judicial discretion. A. 16, A. 111-12. Both courts instead viewed the issue in terms of liquidation, and neither court mentioned any standards upon which the court's exercise of discretion could be based. To support those holdings as an exercise of discretion would be to affirm an unlimited discretion without discernible standards. That result further evidences the need for a clear national standard.[5]

As a third argument against review by this Court, Atlantic Richfield gropes for a consistency in the law on prejudgment interest. Res. Br. at 10-11. However, Atlantic Richfield does not identify any cogent principles

[5] Related to Atlantic Richfield's discretion argument is a theme remaining throughout its brief that the award of prejudgment interest would be "inequitable." *See, e.g.*, Res. Br. at 2. How or why it would be inequitable is not clear. Atlantic Richfield illegally recovered $26.9 million and then unlawfully tried to hide its overrecovery by retroactively reallocating funds from special products. A. 66-68.

that have been consistently applied. Moreover, Atlantic Richfield has not cited a case even remotely similar to this one where prejudgment interest has been denied. If nothing else, TECA's decision is so at odds with the law sporadically emerging in the majority of the circuits as to require resolution of the conflict [6] by this Court. Furthermore, as pointed out in the petition in this case, there is a high level of inconsistency in decisions among the circuits and within the circuits on a very important issue of federal common law that will not go away. *See* Petition at 9-10. As the decision in this case by a national court is so blatantly wrong as to shock the conscience, this case is the perfect vehicle for this Court to express its views.

Respectfully submitted,

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[6] District courts applying the energy laws disagree with TECA's approach to interest in this case. *See, e.g.*, Petition at 6 n.2, Res. Br. at 5-6 n.5.